NO. 72-1584

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

JOHN DOWDY, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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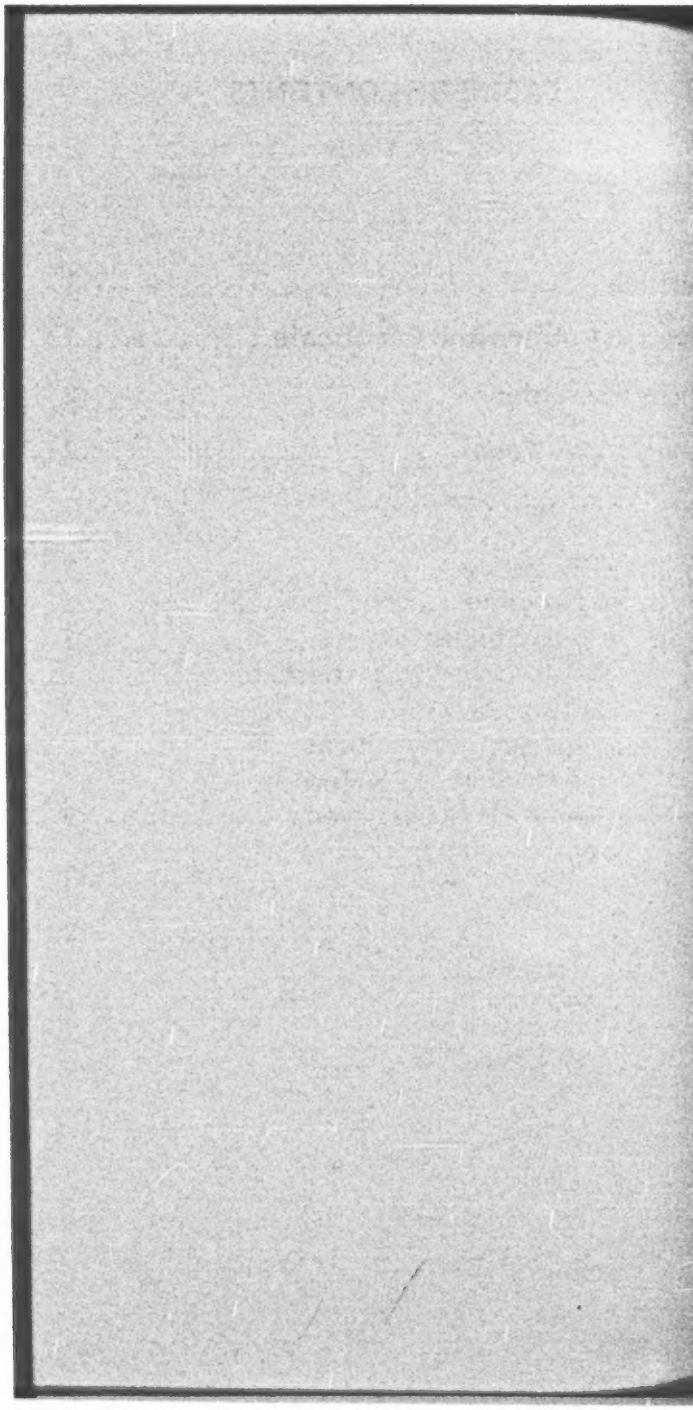

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PETITION FOR REHEARING

ON

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THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Petitioner, John Dowdy, respectfully petitions this Honorable Court under Rule 58, Paragraph 2, Supreme Court Rules, within the enlarged time prescribed by said Rule, for rehearing of his Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, invoking the jurisdiction of this Court under 28 U. S. C. 1254 (1), such writ having been denied on October 9, 1973, and in support of said Petition for Rehearing shows:

GROUNDS FOR PETITION AND CERTIFICATE

This Petition is based on substantial grounds available to

Petitioner which have not been previously presented in his behalf. Petitioner, pro se, and his undersigned counsel certify that this Petition is presented in good faith and not for delay, and is restricted to such substantial grounds, as presented by the following questions:

QUESTIONS PRESENTED

1. Whether a conviction may stand where there is no evidence to support same.

2. Whether a conviction of perjury in violation of 18 U. S. C. 1621 may stand where there is no pleading in the indictment of testimony contrary to the alleged perjured statement.

3. Whether a conviction of perjury in violation of 18 U. S. C. 1621 meets the two witness rule where same is based upon the uncorroborated testimony of a single witness.

4. Whether a conviction of perjury in violation of 18 U. S. C. 1621 may stand when perjury was knowingly used in obtaining conviction.

5. Whether the tape recording of the January 28, 1970 conversation should be suppressed for failure to observe the rules and procedures which had theretofore been established by the Attorney General.

STATEMENT OF THE CASE

Pertinent to this motion, Petitioner was convicted in the United States District Court for the District of Maryland on Counts Six (6), Seven (7) and Eight (8) for perjury in violation of 18 U. S. C. 1621 (A. pp. 32-43).

The Grand Jury testimony introduced in evidence (Tr. pp. 1690-1717), insofar as relevant here, is the same as copied in each of the third numbered paragraphs of Counts Six (6), Seven (7) and Eight (8).

Cohen was the single witness to testify to the alleged perjury. His entire testimony of the conversation of January 20, 1970, is at pages 24 and 25 of the Trial Transcript for November 11, 1971.

The prosecution's transcript of the January 20, 1970 tape

hich is relied upon for corroboration of the single witness stimony is found at pages 399-406 of the Appendix.

The tape recording is government Exhibit 107 (Tr. p. 7, Nov. 29, 1971).

At the time of the recording of the January 20, 1970 nversation, there was in effect (A. p. 102) the June 16, 1967 emorandum by the United States Attorney General setting rth procedures to follow in utilizing recording devices otion Exh. 1, A. p. 99). These procedures included the taining of advance written approval from the Attorney neral for any use of devices to overhear or to record non-lephone conversations without the consent of all of the rties to such conversations.

No written approval was obtained in this instance. Oral proval was given, which included the provision that a court der would be obtained, authorizing the recording (A. p. 4) Court order was obtained and entered in the United ates District Court for the District of Maryland (A. p. 67).

The conversation was recorded in the District of olumbia (A. p. 220).

REASONS FOR GRANTING PETITION

1.

THERE IS NO EVIDENCE TO SUPPORT THE CONVICTION

2

THERE IS NO TESTIMONY PLEADED IN THE INDICTMENT WHICH IS CONTRARY TO THE ALLEGED PERJURED STATEMENT

3

THE COURT BELOW DISREGARDED THE TWO WITNESS RULE

COUNT 6.

This Count charges that Petitioner denied representing Cohen that (a) he had previously told Clark that preventing and reducing the likelihood of Cohen's prosecution would ave to be handled in a way other than Cohen's securing

immunity from prosecution by testifying before a Congressional Committee; and (b) that had it not been for his efforts, Cohen would probably have already been prosecuted.

The testimony which Count 6 recites as being perjury (A. pp. 33-34), briefly narrates as follows: "I think I said earlier that Clark had mentioned something to me about that he could get some money if Cohen could testify and get immunity, and I told him to forget it, that that was not possible. I told Cohen on this occasion that what I told Clark back then was that if he wanted immunity, it would have to be handled in some other way. I did not tell him "that it, meaning defeating the prosecution, stopping the prosecution, would have to be handled by me in some other way.' I never tried to defeat anybody's prosecution. I do not remember Cohen saying to me on that occasion that he regarded me as the one responsible for having kept the prosecution away from him for all these years and that he didn't think it would have happened without my help. He would have no occasion to. I didn't agree with him that I didn't think that the prosecution would have been an abeyance all this time if it hadn't been for my efforts. I made no efforts. I deny saying to Cohen that I didn't think the prosecution would have been in abeyance all that time, if it hadn't been for my efforts."

The recited testimony shows that Petitioner did not deny the statement that "immunity was impossible by testifying before a committee". To the contrary, it is clearly shown in response to the question, "Did you not also tell Cohen on this occasion that what you told Clark back then was that immunity was not possible, but that it would have to be handled in some other way", the reply affirmative, and insisting that the advice was correct, "Well, if he wanted immunity, it would have to be handled some other way". There was no evidence to support the charge of perjury. Thompson vs. City of Louisville, 362 U. S. 189; 4 L. Ed. (2) 654, 659; Taylor vs. Louisiana, 370 U. S. 154. Furthermore, taken with the further statement, recited in the indictment, that "I said earlier that

I told Clark to forget the immunity, that that was not possible", this perjury charge falls because Petitioner's testimony was literally accurate and legally truthful, United States vs. Bronston, 34 L Ed. (2) 568, 93 Sup. Ct.____, and shows he told the Grand Jury substantially what is claimed he denied, Conrad vs. United States, 255 F (2) 247. [1]

Cohen was the sole and only witness concerning the conversation in question. Nowhere does he testify that Petitioner represented to him that had it not been for the efforts of Petitioner, Cohen would "probably have already been prosecuted". Thompson vs. City of Louisville, supra; Taylor vs. Louisiana, supra. Cohen's testimony that "he said he thought he had done a pretty good job on up to that point" is not corroborated by the tape, [2] and must fall under the two witness rule. Weiler vs. United States, 323 U. S. 606, 608-9.

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(1) Perhaps misapprehension could be had from the next ensuing question, in which Petitioner was asked, "Did you not tell Mr. Cohen that what you said to Mr. Clark was that immunity could not be granted, that it, meaning defeating the prosecution, would have to be handled by you in some other way?" Answer, "Oh, no." Question, "You deny saying that?" Answer, "I certainly do. I never tried to defeat anybody's prosecution." The indictment does not charge that this denial was false, but it may be noted that the government's purported tape transcription reads that Petitioner "Told him (Clark) it couldn't be done...that we'd have to handle it this other way". It is obvious to anyone who will listen to the tape (Government's Exhibit 107, Tr. P. 1587, Nov. 29, 1971), that this statement was "I told 'im (Clark) that 'e'd have to handle it this other way".

(2) In any event, Cohen's testimony that "he said he thought he had done a pretty good job on up to that point" and Cohen's voice on the tape saying "It went away you know. I don't think it would have gone away if you hadn't done something", are entirely consistent with Cohen's request for a Committee investigation of his complaint through his attorney (Government Exhibits 5 and 6, Pages 73 & 74 of the Transcript for Nov. 10, 1971) alleging that he was being mistreated by District of Columbia officials because of a newspaper advertisement and his manner of financing, which he averred to have been approved by an FHA official, Mr. Finney; and this is more particularly true in view of Cohen's testimony that he did not tell Petitioner, or any Congressman or Senator, or even his own lawyer, of his criminal activities (Pgs. 102-3-4 and 110, Transcript for November 11, 1971).

COUNT 7.

This Count alleges that Petitioner denied under oath that Cohen represented to him (a) that a payment of $25,000.00 by and on behalf of Cohen was paid to Petitioner in 1965; and (b) that the payment of the said $25,000.00 to Petitioner had done its job.

The indictment pleads in the Count (A. pp. 35-37) that the Grand Jury testimony of Petitioner, purporting to support the alleged perjurious statements, which briefly narrates as follows: "If Cohen said anything about $25,000.00, I didn't get any connection that he was claiming he paid me $25,000.00. He did not say that he had paid me $25,000.00. I do not remember him saying to me that the $25,000.00 back in 1965 had done its job. I don't believe he did. He never paid me anything."

Cohen's testimony that "I told Mr. Dowdy that...I wasn't there to complain about the $25,000 that I had given him". (Tr. p. 24, Nov. 10, 1971) is not corroborated by the tape nor the purported transcript thereof, and is therefore insufficient to survive the two-witness rule. [3] Weiler vs. United States, supra.

The tape and transcript reveal that Cohen did not tell Petitioner that he had been paid $25,000.00 and Petitioner's denial to the Grand Jury that Cohen had made such a representation to him was truthful. United States vs. Bronston, supra.

There was no testimony from Cohen that he had represented that the "$25,000.00 had done its job". Therefore that part of the charge is without support even in the

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(3) The tape, as well as the government's transcript thereof, reveals that Cohen did not tell Petitioner that he paid him $25,000.00. Obviously, Cohen was avoiding expression to Petitioner that he had made a payment to Petitioner. Cohen wilfully testified that he made such representation to Petitioner, knowing he did not do so. It seems a double standard is being applied in demanding perfect recall by Petitioner, with a much lesser test or even no restriction, for the prosecution's witness.

testimony of the single witness. Thompson vs. City of Louisville, supra; Taylor vs. Louisiana, supra. Furthermore, the Grand Jury testimony alleged in this Count to be false, goes no further than that Petitioner did not remember such a statement from Cohen.

COUNT 8.

This Count charges that Petitioner had (a) represented to Cohen that he would attempt to assist Cohen by attempting to ascertain the status of an investigation of Cohen then pending before the Department of Justice and in the office of the United States Attorney for the District of Columbia; and (b) expressed to Cohen the hope he could do something for Cohen concerning said investigation.

The testimony pleaded as false in the County (A. pp. 38-43) is lengthy and repetitious, the material portion, including repetitions, briefly narrates as follows: "I never told Cohen that I would check over at the prosecutor's office to see what I could find out for him about the pending investigation. About all I remember about Cohen coming to my office on this occasion is that he still wanted to come before a subcommittee and get immunity. That is about all I recall about the conversation. I do not believe he asked me to see what I could find out or do some checking or anything like that, but he might have brought a little something of that in; I was disgusted with him and told him to go talk to his lawyer.[4] I did not agree to check with the United States Attorney's office or the Department of Justice to see what I could find out. I have never contacted the United States Attorney's office or the Department of Justice on his behalf, and I never told him that I would. I did not tell him that I would check over in the Department or in the United States Attorney's office to see what I could find out about the case and see what

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(4) Actually, telling Cohen to talk to his attorney occurred during Cohen's telephone conversation to Petitioner in Texas a few days before, on January 13, 1970. (Government Exhibit 107, T. pg. 1587, November 29, 1971)

I could do."

Petitioner was repeatedly asked whether he told Cohen he would check with the United States Attorney or the Department of Justice, and each time he said he did not. At no time did Cohen testify that Petitioner said he would contact or check with the United States Attorney or the Justice Department, which was the burden of the questions propounded to Petitioner before the Grand Jury. Neither does the tape contain such a representation.

Taken with Petitioner's Grand Jury testimony that about all he recalled of the conversation was that Cohen still wanted to testify before a committee to get immunity, and that "I don't believe he asked me what I could find out for him, but he might have brought something of that in" any question of perjury is negated. The last charge, that Petitioner "expressed the hope that he could do something for Cohen concerning the said investigation": there was no testimony from Cohen, the single witness, that Petitioner made such an expression; the Grand Jury testimony of Petitioner pleaded in the indictment does not contain or include any testimony on this charge, one way or the other. (The pleading in Count 8, shown at pages 38-43 of the Appendix, is cited to show that there is nothing there plead that Petitioner testified either way on this expression.) It therefore must fall because of no evidence, Thompson vs. City of Louisville, supra; Taylor vs. Louisiana, supra, and as the pleadings. There being no specifications of the testimony claimed to be false, Petitioner was not informed, acceptably to the Constitution, of the nature of this accusation. United States vs. Simplot, 192 F. Supp. 734, 737.

Furthermore, there was no testimony from Cohen, the single witness, that Petitioner made such an expression (T. pp. 24-5). Thompson vs. City of Louisville, supra; Taylor vs. Louisiana, supra.

4.

PERJURY WAS KNOWINGLY USED TO OBTAIN CONVICTION.

Perjury knowingly used in obtaining the conviction, the conviction will not be allowed to stand. Garrison vs. United States, 154 F. (2) 106. Mooney vs. Holohan, 294 U. S. 103. In Count 7, it is charged that Petitioner denied that Cohen represented to him that a payment of $25,000.00 by and on behalf of Cohen was paid to Petitioner in 1965.

The Tape, as well as the government's transcript thereof, reveals that Cohen did not tell Petitioner that Cohen paid him $25,000.00.

Cohen testified that "I told Mr. Dowdy that...I wasn't there to complain about the $25,000.00 that I had given him". The Tape and the government's transcript of the Tape each reveal that Cohen did not tell Petitioner that he gave him $25,000.00.

Though the Tape shows that Cohen made mention of $25,000.00, it is obvious that Cohen carefully avoided any expression to Petitioner that he had made such payment to Petitioner. Cohen testified further that the U. S. Attorney had instructed him to mention the fact in conversation that he had paid Petitioner $25,000 (A p. 157). [5] and he wilfully testified that he made such representation to Petitioner, knowing he did not do so, and the prosecutors, having the Tape and their transcript, knew that he did not do so when such testimony was elicited from him.

5.

THE RULES AND PROCEDURES ESTABLISHED BY THE ATTORNEY GENERAL WERE NOT OBSERVED IN OBTAINING THE JANUARY 20, 1970, TAPE.

On June 16, 1967, the United States Attorney General

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(5) Prosecution witness, FBI Agent Bonner also testified that Cohen was instructed to pin down his allegation that there was a $25,000.00 bribe. (App. P. 219)

circulated a memorandum setting forth certain procedures for all agencies having responsibility for law enforcement to follow in utilizing electronic and related devices designed to intercept, overhear or record private verbal communications. (Motion Exhibit 1, A. p. 99). These procedures include the obtaining of advance written approval from the Attorney General for any use of mechanical or electronic devices to overhear or record non-telephone conversations without the consent of all of the parties to such conversations. Deputy Assistant Attorney General Henry Edward Petersen testified that oral approval was given for the use of such a device, but along with the approval, the United States attorney was advised that a court order should be obtained. (A. p. 104). Court order was entered in the United States District Court for the District of Maryland. (A. p. 67). The conversation was recorded in the District of Columbia. (A. p. 220)

It is necessarily contemplated that the requirement for a court order would include that the same be validly executed. It is statutory, as well as fundamental law that an order or warrant such as here involved is valid only in the District in which it is entered, namely, the District of Maryland, 18 U. S. C. 2518 (3). The order having been executed in the District of Columbia, there was no compliance with even the oral authorization given under the June 16th, 1967 memorandum.

It may be noted that the Deputy Assistant Attorney General testified that the approval for use of the electronic device was burdened with requirement for a court order only as a precaution. Nevertheless, the requirement was there, the reason for it having been invoked being wholly immaterial.

In this case, the Attorney General did not give his written approval for the recording as required by the memorandum of June 16, 1967, but if the oral approval be deemed sufficient compliance then the United States Attorney failed to comply by obtaining the required court order valid in the District of

Columbia where the recording was made on January 20, 1970.

The law is clear, that as long as a departmental regulation remains operative, it must be obeyed, A government agency must scrupulously observe rules of procedures which it has established, and when it fails to do so its action cannot stand, and courts will strike it down. Accardi vs. Shaughnessy, 347 U. S. 260; United States vs. Heffner, 420 F (2) 809.

SUMMARY

The evidence relating to these three counts in the indictment consisted of only a portion of two pages of testimony, out of a transcript of 4,972 pages, and one Exhibit out of a total of 251 Exhibits, in a trial that lasted 49 days, which was directed to proof and denial of counts one, two and three of the indictment.

With these tiny bits swallowed by a mountain of testimony and exhibits, much of which was held by the Court of Appeals to have been inadmissable, it is not hard to understand how the jury, not versed in the law, and having lost the relevant testimony as a grain of sand in the desert, took the uncontroverted facts that Petitioner did participate in the committee investigation of the Complaints outlined in Government's Exhibits 5 and 6 as evidencing guilt, and carried this forward to Counts 6, 7 and 8, and on the theory that Petitioner was indicted on those, too, just returned a guilty verdict on all counts. United States vs. Beach 296 F (2) 153, 159.

That the jury did so act is emphasized when it is seen that the Court of Appeals wrote in its opinion that "the evidence to show guilt on these counts was overwhelming" (Slip Op. pg. 38), having earlier in the opinion (p.p. 14-15) written that Petitioner flatly denied under oath each of the six representations alleged to be perjury. In the light of the above examination of Counts 6, 7 and 8, Cohen's testimony relating to them, and to the Tape, it becomes clear that the Court of Appeals was in error.

Similarly, the Solicitor General's statement in his Brief in Opposition that "the contradiction between Petitioner's two statements and the proof of the falsity of his grand jury testimony were so overwhelming as to preclude any inference other than that of guilt" would not have been made had he examined the testimony and the matter recited in the third numbered paragraph of each of the counts. These errors, innocent though they might have been, prejudiced Petitioner in his right to a fair and impartial trial, as guaranteed by the United States Constitution.

CONCLUSION

Though either one of the foregoing, taken alone, might not be sufficient, when taken together, this Petition for Rehearing of Petition for Writ of Certiorari should be granted, or, in the alternative, these questions should be remanded to the Court of Appeals for further consideration.

Respectfully submitted,

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November, 1973